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No. _____

In The
Supreme Court of The United States
October Term 1998

JAY B. MARCUS, MARCUS FOR CONGRESS, THE NATURAL LAW PARTY OF IOWA, EDWARD T. RUSK OF THE WORKING CLASS PARTY, EDWARD T. RUSK FOR CONGRESS, MICHAEL CUDDEHE, MICHAEL DIMICK, ROGERS BADGETT, PETER LAMOUREUX, FRED GRATZON, and SUSAN MARCUS,
Petitioners,

v.

IOWA PUBLIC TELEVISION, a state agency, and DANIEL K. MILLER in his official capacity,
Respondents.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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79 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether a state-owned public television broadcaster sponsoring candidate debates can exclude third party candidates from participation in the debates based on the broadcaster's determination that the candidates are not "newsworthy," meaning, as the trial judge defined the term, that the candidates or their material are not "sufficiently interesting to the network's audience and the general public. . . ."

2. Whether under the Supreme Court's decision in Regan v. Time, Inc., 468 U.S. 641, 648, 104 S. Ct. 3262, 3267, 82 L. Ed. 2d 487 (1984), holding that "newsworthiness" is an unconstitutional content-based criterion that cannot be used by government as a basis for decisions about speech, a state-owned public broadcaster can use "newsworthiness" as the criterion for excluding ballot-qualified candidates from debates sponsored by the broadcaster.

3. Whether, under Arkansas Educational Television Commission v. Ralph P. Forbes, ___ U.S. ___, 118 S. Ct. 1633 (1998), a state-owned public television broadcaster sponsoring candidate debates can exclude third party candidates from participation in those debates on subjective grounds, without making a candidate-by-candidate determination as to which candidates should participate in

the debates, and without having significant information about the candidates.

4. Whether a third party candidate who had generated 87 known (and many unknown) radio and television appearances and print articles from February, 1996, to a date approximately two and one-half months before the November, 1996 election (coverage that was far greater than coverage for the major party candidates), and who was recognized by the private press to be running a "visible campaign," could be excluded from the debate in the absence of the public broadcaster having any other significant information about this candidate's public support.

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

Plaintiffs:

Jay B. Marcus,
Marcus for Congress,
The Natural Law Party of Iowa,
Edward T. Rusk of the Working Class Party,
Edward T. Rusk for Congress,
Michael Cuddehe,
Michael Dimick,
Rogers Badgett,
Peter Lamoureux,
Fred Gratzon,
Susan Marcus

Defendants:

Iowa Public Television, a state agency,
Daniel K. Miller, in his official capacity

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vii

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL PROVISIONS AND STATUTES . 1

STATEMENT OF THE CASE 2

ARGUMENT 5

1. The trial court determined that the Petitioner candidates were excluded by IPTV from debates because they were not "newsworthy," which, as applied in

this case, was content-based and viewpoint based, and an impermissible subjective standard. 5

A. This is an important issue for the Court because a decision about whether a candidate is "newsworthy" is routinely made by broadcasters in making journalistic decisions, yet decisions about a candidate's newsworthiness are subjective and involve an analysis of the candidate's ideas. 5

B. Newsworthiness is an impermissible content-based standard. 8

C. An evaluation of whether a candidate is "newsworthy" is an impermissibly subjective standard that cannot be challenged by an excluded candidate and can be used as a shield by government to conceal the censorship of dissenting voices. ... 11

2. This case provides an opportunity to render a decision that balances the extreme situation in the Forbes case of a candidate whom the Court found had no support, with a situation where candidates had significant

support but were excluded using an admittedly subjective standard without a fact-finding inquiry. 17

CONCLUSION 20

APPENDICES

Appendix A

United States Court of Appeals for the Eighth Circuit. A-1

Appendix B

United States District Court for the District of Iowa. B-26

Jury Instruction #15. . . . . B-36

Appendix C

Statutes. C-37

TABLE OF AUTHORITIES

Arkansas Educational Television Commission v. Ralph P. Forbes, ___ U.S. ___, 118 S. Ct. 1633 (1998)..... i, 3-6, 12, 13

Bradley v. Ragheb, 633 A.2d 192 (Pa. 1992).....17

Carey v. Brown, 447 U.S. 455, 467, 100 S. Ct. 2286, 2293, 65 L. Ed.2d 263 (1980)..... 19

Forbes v. Arkansas Television Comm'n, 93 F3d 497 (8th Cir. 1996)..... 11

Greenberg v. Bolger, 496 F. Supp. 756, 776 (E.D. N.Y. 1980)..... 20

Marcus v. Iowa Public Television, 93 F. 3rd 1137 (8th Cir. 1996)..... 4

Mulder v. Commissioner of Internal Revenue, 855 F.2d 208 (5th Cir. 1988)..... 17

New York Times Co. v. Sullivan, 376 U.S. 254, 270, 84 S. Ct. 710, 720, 11 L. Ed. 2d 686, 701 (1964)..... 19

Owens v. Lac D'Amiante Du Quebec, Ltd., 656 F. Supp. 981, 983 (E.D. Pa. 1987), aff'd, 833 F.2d 306 (3rd Cir. 1987)..... 17

Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46, 103 S. Ct. 948, 955, 74 L. Ed. 2d 794 (1983)..... 9

Regan v. Time, Inc., 468 U.S. 641, 648, 104 S. Ct. 3262, 3267, 82 L. Ed. 2d 487 (1984)..... i, 10, 11, 20

Rosenberger v. Rector & Visitors of the University of Virginia, 515 U.S. 819, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995)..... 9

SECONDARY AUTHORITIES:

J.D. Gillespie, Politics at the Periphery: Third Parties in Two-Party America, Univ. of So. Carolina Press, 24 (1993).....19

OPINIONS BELOW

The decision of the U.S. District Court for the Southern District of Iowa is reported at 24 Med. L. Rpt. 2531 (S.D. Iowa 1996) . The decision of the United States Court of Appeals for the Eighth Circuit is reported at 150 F.3d 924 (8th Cir. 1998).

STATEMENT OF JURISDICTION

This Petition for Writ of Certiorari is taken from the July 30, 1998, Opinion and Judgment of the United States Court of Appeals for the Eighth Circuit pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

The citations to the Constitutional provisions and federal and state statutes applicable to the case are: First Amendment to U.S. Constitution; Fourteenth Amendment to U.S. Constitution; 42 U.S.C. § 1983; 28 U.S.C. § 1331; 28 U.S.C. § 1343; 28 U.S.C. § 2201; 28 U.S.C. 2202; Iowa Code § 256.3; Iowa Code § 256.81; Iowa Code § 256.82; Iowa Code § 256.84; Iowa Code § 262.2. The text appears in the appendix.

STATEMENT OF THE CASE

Petitioners were ballot-qualified third party candidates for U.S. Representative in Iowa's five Congressional Districts, except that Petitioner Fred Gratzon was a ballot-qualified third party candidate for U.S. Senate, and Petitioner Susan Marcus a registered voter in Iowa who desired to hear the Petitioner candidates participate in forums with Republican and Democratic candidates and other legally qualified candidates. The Petitioner candidates were representatives of the Natural Law Party and, in the case of Edward T. Rusk, the Working Class Party. The Respondent, Iowa Public Television ("IPTV"), is a state agency owned and controlled by the state of Iowa, and Daniel K. Miller is its programming director.

The case began in the United States District Court in the Southern District of Iowa, when Petitioners sought declaratory and preliminary and permanent injunctive relief requiring IPTV to include the Petitioner candidates in five debates being sponsored by IPTV in the 1996 federal elections. Prior to rendering its decision to exclude the third party candidates from the debates, IPTV never sought any significant information about the public support for the Petitioner candidates, or whether they were deemed to be

serious candidates by the press, or about their media coverage, finances or campaign activities.[1]

In contrast to the instant case, in Arkansas Educational Television Commission v. Ralph P. Forbes, ___ U.S. ___, 118 S.Ct. 1633 (1998), AETC sought the advice of independent reporters who covered the race in question and Mr. Forbes himself acknowledged the lack of interest of the press and others in his campaign. While the decision in Forbes was based on objective grounds, including the opinions of independent authorities, the decision in this case was made by IPTV alone, based on "newsworthiness," a standard that was admitted by IPTV to be "extraordinarily subjective" (i.e., a standardless standard).

Jurisdiction in the district court was founded on the existence of a federal question arising under the First and Fourteenth Amendments to the U.S. Constitution and under 28 U.S.C. § 1331 (district courts have original jurisdiction over legal actions under the Constitution and laws of the United States), 28 U.S.C. § 1343 (district courts have original jurisdiction to address a deprivation of rights under color of state law or any right or privilege under the U.S. Constitution), 28 U.S.C. § 2201 (providing in a case within its

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1/ Although IPTV did contact a Professor Barbara Mack, a member of IPTV's advisory committee on editorial matters, she was not an unaffiliated or independent authority, and Professor Mack testified that she had never received any materials about the third party candidates she was asked about, and admitted she did not know anything about some of them, and that IPTV had never mentioned their names (Trial Tr. Vol. II 409-413).

jurisdiction, the district court may declare the rights and other legal relations of any interested party), and 42 U.S.C. § 1993 (authorizing a civil action for deprivation of rights under color of any statute).

The district court, after determining that the Petitioners had been excluded from the debates because they were deemed not to be "newsworthy" or "sufficiently interesting," held, nevertheless, that there was a compelling state interest in permitting Respondent IPTV to exercise journalistic discretion concerning who was newsworthy and should appear in its debates.

Following the district court's decision, the Petitioners filed their Notice of Appeal to the Eighth Circuit Court of Appeals and an Emergency Motion for an Injunction during the pendency of an appeal. The emergency motion was denied by a divided panel of the Eighth Circuit on October 11, 1996. Marcus v. Iowa Public Television, 93 F. 3rd 1137 (8th Cir. 1996). Following the decision of the Court in Arkansas Educational Television Commission v. Ralph P. Forbes, Forbes, ___ U.S. ___, 118 S. Ct. 1633, 1640 (1998), the Eighth Circuit Court of Appeals affirmed the decision of the district court, holding that the decision of IPTV was reasonable and that it was viewpoint neutral.

ARGUMENT

1. The trial court determined that the Petitioner candidates were excluded by IPTV from debates because they were not "newsworthy," which, as applied in this case, was content-based and viewpoint based, and an impermissible subjective standard.

A. This is an important issue for the Court because a decision about whether a candidate is "newsworthy" is routinely made by broadcasters in making journalistic decisions, yet decisions about a candidate's newsworthiness are subjective and involve an analysis of the candidate's ideas.

In its recent decision in Arkansas Educational Television Commission v. Ralph Forbes, ___ U.S. ___, 118 S. Ct. 1633, 1640 (1998), this Court differentiated between public broadcasting as a general matter, where the First Amendment "does not compel public broadcasters to allow third parties access to their programming," Id., and "candidate debates [which present] the narrow exception to the rule," Id. This Court held the debate in Forbes was a nonpublic forum, and that a candidate could be excluded from a debate if the exclusion was viewpoint-neutral and otherwise "reasonable in light of the purpose of the property." Id. at 1643.

The Court said "Forbes was excluded not because of his viewpoint but because he had generated *no* appreciable public interest." Id. at 1644 (emphasis added). While the

dissenting opinion in Forbes (J. Stevens) noted that AETC argued to the Supreme Court that its judgment was based on "newsworthiness," while arguing to the Court of Appeals that its judgment was about "political viability," the majority opinion in Forbes did *not* determine whether "newsworthiness" provided a Constitutional standard for the exclusion of candidates. The Court determined that AETC's decision was reasonable because Forbes had virtually no public support, was not considered a serious candidate, and the decision to exclude him from the debate was not based on opposition to his views. Id. at 1643-1644.

The issue of whether candidates can be excluded based not on reasonable, objective grounds as in Forbes, but because they are not "newsworthy"— a standard that was admitted by IPTV to be "extraordinarily subjective" (Trial Ex. 20, Miller Depo. at 22, lines 5-18) — is an important issue for this Court since journalists routinely consider the newsworthiness of a candidate in making their decisions, and government journalists need guidance in determining whether such judgments are proper in making decisions about candidate selection in political debates.

Moreover, the district court in this case defined "newsworthiness" to mean persons or materials who are "sufficiently interesting," which seemingly requires an analysis of the candidate's ideas. (Jury instruction No. 15, Appendix B-36.) In fact, a journalist's decision about a candidate's newsworthiness can be divorced from an evaluation of the candidate's ideas and political views.

Professor Barbara Mack, IPTV's expert from the Iowa State University School of Journalism, provided the only expert testimony in the case on the meaning of the term "newsworthy." Professor Mack defined newsworthiness as follows:

> When I teach freshmen journalist about what is meant by newsworthiness, what makes someone newsworthy, you talk about the - - the quality that that person or news event has. Is that news event going to have an impact on the people who read your newspaper or who watch your television station? Is it going to change their lives? Does it have the potential to change their lives? (Trial Tr. Vol. II at 354-355).

Evaluating the quality of a political candidate has to be based on the quality of the candidate's ideas, and evaluating whether the news event [debate] is "going to have an impact on the people" or "change their lives" must depend on the views expressed. When Professor Mack was asked at trial about the decision of whom to invite to a program like the debates at issue, she answered:

> The newsworthiness of the interviewee is the ultimate test. Does that person have *information* to share with viewers that will inform them, that will help them make a decision, that will enable them to lead their lives better, that will enable them to be better taxpayers, better citizens, better residents of

> their community? And—*The ability of the interviewee to explain that* ***viewpoint*** *and to bring viewers information that will inform them is the test.* (Emphasis Added).

(Trial Tr., Vol. II at 369).

Professor Mack's test requires an evaluation of the "information" the candidate has and his or her ability to explain that "viewpoint." While the trial judge used a somewhat different definition in his instructions to the jury (defining "newsworthiness" to be whether the candidate or his materials would be sufficiently interesting to the audience), both definitions involve an analysis of a candidate's ideas.

When the jury answered special verdict question number 7 that the Petitioner candidates were excluded from the debates "based on newsworthiness" (Appendix, B-30), and when the district court decided that the Petitioner candidates were excluded from the debates by IPTV because they were not newsworthy (Appendix, B-33), it raised the important issue of whether such a standard is too vague or subjective or too dependent on the candidate's ideas to provide a Constitutional basis for a candidate's exclusion from a debate by a public broadcaster.

B. Newsworthiness is an impermissible content-based standard.

A candidate without significant public support, but

with novel and appealing ideas, might very well be deemed to be an "interesting" and, therefore, newsworthy candidate, according to the district court's definition of the term "newsworthy." At the same time, a candidate with public support (based perhaps on name recognition alone), but without ideas deemed by the broadcasters to be interesting, might very well be deemed to be an "uninteresting" candidate and therefore, not newsworthy. The newsworthiness of a candidate, therefore, is unconstitutionally linked to the content of the candidate's materials and an evaluation of whether the candidate's ideas are "interesting."

In Rosenberger v. Rector & Visitors of the University of Virginia, 515 U.S. 819, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995), this Court distinguished between content discrimination, which the Court said "may be permissible if it preserves the purposes of the limited forum," and viewpoint discrimination, which "is presumed impermissible," even in a non-public forum, when directed against speech otherwise within the forum's limitations. Rosenberger at 115 S. Ct. 2517. The Rosenberger Court explained that viewpoint discrimination is "an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." Id; citing Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46, 103 S. Ct. 948, 955, 74 L. Ed. 2d 794 (1983). Here, unlike in Forbes, the jury found the Petitioner candidates were excluded from the government

sponsored debates because the government employees determined that their political messages, campaigns, and/or their candidacies themselves (*i.e.*, their viewpoints), were not sufficiently interesting.

The rulings of the two lower courts are in disregard of this Court's holding in Regan v. Time, Inc., 468 U.S. 641, 648, 104 S. Ct. 3262, 3267 82 L.Ed. 2d 487, 494 (1984). In Regan, this Court held in no uncertain terms that the determination of newsworthiness is a decision "dependent solely on the nature of the message being conveyed," and that to "permit the government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment." In Regan, which involved the publication of photographs of money, this Court stated:

> [U]nder the statute [(18 U.S.C. § 504(1)], one photographic reproduction will be allowed and another disallowed solely because the Government determines that the message being conveyed in the one is newsworthy or educational while the message imparted by the other is not. The permissibility of the photograph is therefore often 'dependent solely on the nature of the message being conveyed.' *Regulations which permit the government to discriminate on the basis of the message cannot be tolerated under the First Amendment.*

Id. (Citations omitted; emphasis added.)

Although Regan arose in the criminal context, there is

no reason to believe that its condemnation of the suppression of speech based on an analysis of newsworthiness applies only in criminal matters. The Regan Court held that the regulations were impermissible due to the First Amendment, *not* because the defendant was accused of a crime. A ballot-qualified candidate for Congress, seeking to engage in political speech, an activity "at the very core of the First Amendment" (Forbes v. Arkansas Educational Television Commission, 93 F. 3d 497, 504 (8th Cir. 1996)), should be entitled to at least as much protection under the Constitution as the criminal defendant in Regan.

In Regan, once this Court determined that the "newsworthiness" standard was content based, it simply stated that it could not be tolerated under the First Amendment, and that it was "constitutionally infirm." Regan, 468 U.S. at 648, 104 S. Ct. at 3267, 82 L. Ed. 2d 487 (1984). The Court engaged in no further substantive analysis of the constitutionality of the statute to justify its holding.

By discretionarily determining whether third party candidates are sufficiently "newsworthy" to be permitted on public television, IPTV is engaging in an unconstitutional, content-based evaluation of expression. Such conduct by the government contravenes the First and Fourteenth Amendments.

C. An evaluation of whether a candidate is "newsworthy" is an impermissibly subjective standard that cannot be challenged by an excluded candidate and

can be used as a shield by government to conceal the censorship of dissenting voices.

IPTV conceded that a decision about a candidate's "newsworthiness" was an "extraordinarily subjective" judgment (Trial Ex. 20, Miller Depo. at 22. lines 5-18). As a result, unlike the objective test of reasonableness applied in the Forbes case, here there is no standard limiting the discretion of government employees to exclude a candidate from a debate.

The Petitioner candidates' exclusion from the debates cannot be said to have been reasonable since no objective test was employed. On the other hand, the decision in Forbes was objective and was found to be reasonable because the Court accepted that AETC excluded Forbes because (1) Arkansas voters did not consider him a serious candidate, (2) news organizations did not consider him a serious candidate, (3) the Associated Press and another reporting service did not plan to run his results on election night, (4) Forbes had little, if any, financial support, and (5) there was no "Forbes for Congress" campaign headquarters except at his house. Forbes at ___ U.S. ___, 118 S.Ct. 1633 at 1643-1644. The Court's opinion also placed substantial emphasis on Forbes' own description of his campaign organization as "bedlam," and the media coverage of his campaign as "zilch." Id., 118 S.Ct. at 1644.

Thus, Ralph Forbes' lack of support was determined by AETC based on the independent evaluations of others (items 1 through 3 above), or objectively determined financial or campaign activities (items 4 and 5), and Forbes' own admissions

that he had "zilch" in the way of press coverage. These are objective factors, and the Court itself stated that "[Forbes] own *objective* lack of support, not his platform, was the criterion." (emphasis added) Id., at 1644.

In this case, Mike Newell, who made IPTV's decision to exclude the Petitioner candidates, did not consider objective factors. Newell never investigated whether the voters considered the Petitioner candidates to be serious candidates, nor did he ask news reporters or any independent journalists[2] whether any Petitioner candidate was considered

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[2] IPTV alleges that it contacted Professor Barbara Mack, a member of IPTV's advisory committee on editorial matters (not unaffiliated or independent authorities) to assess the impact of the 8th Circuit Forbes decision on IPTV's decision to exclude the third party candidates, and IPTV argues that she "affirmed" the evaluation that the third party candidates were not newsworthy. But even if the decision was affirmed, that does not mean any reasonable criteria were applied or that facts were evaluated. Professor Mack did not cover these political races and teaches communications law and news writing courses, not politics (Trial Tr. Vol. II, p. 345-348). She admitted she had never received any materials on the third party candidates she was asked about, and said she did not know anything about some of them and that IPTVs representative never even mentioned their names. (Trial Tr. Vol. II 409-413). Professor Mack's decision was based on the fact that she, personally, had not heard about the candidates in the press. (Trial Tr. Vol. II, 412-415). This is not a reasonable basis for an affirmation, especially since Iowa has 99 counties, with 27 counties in the rural third district alone where Marcus ran, and more than 140 separate media outlets (radio or television stations or newspapers) covering the third district, most of which do not reach Mack's hometown of Ames, Iowa. Professor Mack

a serious candidate, or whether they would receive coverage on election night. He did not inquire whether the candidates had separate campaign headquarters, or how much money they had raised or were planning to invest from their own resources (Trial Ex. 19, Newell Depo. Tr., p. 47-48). And no Petitioner candidate ever admitted to anything approaching "bedlam" in their campaigns or "zilch" in the way of press coverage.

While Forbes does not require any particular factors to be considered in making a "reasonable" decision, in this case IPTV had virtually no significant information about the Petitioner candidates and did no significant fact finding.

Petitioner Marcus, for example, practically begged IPTV's Mike Newell, in the months preceding the debates, to tell him what the criteria were to be invited to the debates, but Newell would not respond. Marcus wrote Newell asking "who [he] should talk to about any criteria for inclusion in the debate." Marcus sent Newell information showing his significant press coverage, telephoned Newell twice, and told Newell the Republican and Democrat candidates agreed Marcus should be in the debate. Marcus was eager to supply additional information (which Marcus alone would know), but Newell never responded to Marcus' letters or calls and

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also never denied that Petitioner Marcus, for example, had public support. Professor Mack merely argued that "although there were many stories about [his] candidacy," her "impression" was that his candidacy "had not generated *massive* public support." (emphasis added) (Trial Tr. Vol. II 422).

was not interested in receiving information from the candidates. (Tr. Ex. 9, p. 16 and 23).

Yet even the limited information Marcus was able to furnish to Newell showed more media coverage, press releases, brochures, and appearances than any Republican or Democrat (Trial Exs. 9, 15, 16, 45). Newell's deposition exhibits (admitted into evidence at the trial) showed virtually nothing in his files for the Republicans and Democrats included in the debates (Trial Exs. 1-4), and he conceded that he did not rely on other information other than their major party affiliation, in deciding to invite some of them to the debates. (Trial Ex. 19, Newell Depo., pp. 25-28). In contrast, for Marcus, Newell's file revealed (a) 87 known radio, television and newspaper accounts for Marcus from February, 1996, through August 28 1996, including national recognition from appearances by Marcus on the *Ian Punnett Show* on WGN radio in Chicago (which reaches much of Iowa), and the *David Essel Show,* a nationally syndicated radio show that aired on WHO radio (a station reaching most of Iowa) along with its nearly simultaneous broadcast on six or seven other Iowa stations (Trial Ex. 9, p. 34; Trial Ex. 16; Trial Ex. DD), and (b) 127 radio and television appearances and print articles from February, 1996, until the trial, including an article wherein the Republican and Democrat candidates agreed Marcus should be in debates (Trial Ex. 45, p. 20), and an article on Marcus referring to the "visible campaign" he was running, (Trial Ex. 45, p. 7-8). Marcus was the author of three books, was the former Chairman of an Iowa State Bar

Association ethics committee, and IPTV knew from its files that Marcus's 1996 book on crime had been described by *Bookviews* as one of the five best new non-fiction books (Trial Ex. 9, p. 14 and 35).

Petitioner Gratzon was also a prominent figure who was described by *Fortune* magazine as "someone to watch." Newell's files indicated Gratzon's entrepreneurship won coverage in *The Wall Street Journal, The New York Times, Business Week, People, Money, Success, The Today Show, and CNN,* among others (Tr. Ex. 5, p. 82).

While IPTV criticized Marcus for raising only $13,000 for his campaign as of September, 1996, and Gratzon for raising $25,000 for his campaign, this was comparable to the amount of money raised by Democrat Donna Smith, who was invited to the debates, who raised only $17,000 in her campaign (Trial Tr. Vol. I, p. 183), and about whom Newell knew only that she was a Democrat in making the decision to include her in the debates (Trial Ex. 19, Newell Depo., p. 35).

Most importantly, the money raised was *not* something that IPTV considered as part of its decision to exclude the third party candidates from the debates. It was not until September 24, 1996, *after* the commencement of the lawsuit and months after the IPTV decision to exclude the Petitioner candidates from the debates, that IPTV asked the Petitioner candidates for the *first time* (in litigation interrogatories) about the money they had raised, the number of employees and volunteers working for them, their public appearances and the like. (Trial Tr. Vol. I at pp. 208-209).

This information was not a public record and was possessed only by the candidates who were not consulted by IPTV.

Even as of the date of his deposition, on September 25, 1996 (which was several months after he selected the candidates), Mr. Newell testified that he did not know how much money any of the Petitioner candidates had raised, or whether their contributions were broadly-based (Trial Ex. 19, Newell Depo. Tr., p. 47-48), nor did he know, since the end of July 1996, how many new radio and TV interviews Marcus had done, or how many print articles had appeared about him (Newell Depo. Tr., p. 47).

If government employees can ignore obvious sources of information about candidates who are eager and willing to provide information, and especially where, as here, those candidates actually had significant public support, government employees can never be held accountable for their decisions. In Mulder v. Commissioner of Internal Revenue, 855 F.2d 208 (5th Cir. 1988), the court held that the IRS failed to act reasonably in attempting to locate a taxpayer's address when the IRS failed to contact the taxpayer's agent who prepared the return. See also Bradley v. Ragheb, 633 A.2d 192 (Pa. 1992), citing Owens v. Lac D'Amiante Du Quebec, Ltd., 656 F. Supp. 981, 983 (E.D. Pa. 1987), aff'd, 833 F.2d 306 (3rd Cir. 1987) ("Failure to make inquiry when information is available is failure to exercise reasonable diligence as a matter of law.")

2. This case provides an opportunity to render a decision that balances the extreme situation in Forbes, of a candidate whom the Court found had no support, with a situation where candidates had significant support, but were excluded using an admittedly subjective standard without a fact-finding inquiry.

A public television station that decides to sponsor debates between only the two candidates with the highest ratings in the polls would be making an objective determination, but under such a standard the public broadcaster would always exclude all but the major party candidates, and minority voices would not have the unique opportunity of a debate to challenge the parties in power.

This raises the question of what standard is not just *objective* but also *reasonable* and the perspective from which the reasonableness of the decision is to be evaluated. The decision in Forbes suggests that reasonableness should be considered in light of the purpose of the debates. Forbes at 118 S.Ct. 1633, 1643 (a candidate can be excluded if the exclusion was viewpoint-neutral and otherwise "reasonable in light of the purpose of the property.") The objective should be to provide candidates who have a modicum of public support (this Court said Mr. Forbes had *no* appreciable public support) a fair opportunity to challenge the political *status quo*, at least where there are not so many candidates clamoring to gain access to the debates that it shuts down this important channel for public education.

Petitioners submit that the public support necessary to allow a third party or independent candidate to participate in a government-sponsored debate need not be "massive," as was suggested by Professor Barbara Mack, ıPTV's expert (Trial Tr. Vol. II at 422), but should simply be that support that encourages "uninhibited, robust, and wide-open debates," New York Times Co. v. Sullivan, 376 U.S. 254, 270, 84 S. Ct. 710, 720, 11 L. Ed. 2d 686, 701 (1964) so that political and societal changes "may be obtained through lawful means," Carey v. Brown, 447 U.S. 455, 467, 100 S. Ct. 2286, 2293, 65 L. Ed.2d 263 (1980), and reform ideas from the third party camps can be heard.

As stated in an important treatise on third party activities, "Many of America's noblest and far-reaching advances in freedom were third party proposals years before major parties touched them even with the longest pole." J.D. Gillespie, *Politics at the Periphery: Third Parties in Two-Party America*, Univ. of South Carolina Press, 24 (1993) (identifying the abolition of slavery and child labor, woman suffrage, the graduated income tax, and unemployment insurance, among others, as third party proposals). Third party contributions to democratic ideals and progress in society are not just coincidence. The major parties often build their platforms and appeal to the electorate based on the most "mainstream" ideas because most of the votes are in the middle. On the other hand, fundamental reform typically comes from outside what is already popular and mainstream, strongly suggesting that the health and progress of a

democracy depend on hearing from minority voices.

If third party candidates must have the support equivalent to that of the major party candidates *before* they can gain access to a state sponsored debate, a formidable catch-22 exists, preventing the introduction of new ideas in society, since in an electronic age, new ideas and new parties need broadcast exposure in order to *gain* popular support. See Greenberg v. Bolger, 496 F. Supp. 756, 776 (E.D. N.Y. 1980).

CONCLUSION

The standard IPTV claims to have applied in this case, "newsworthiness," was not addressed by the majority decision of the Supreme Court in Forbes, although, as set forth above, the Court has previously, in the Regan case, held "newsworthiness" to be an unconstitutional standard. The decision of the lower courts is in conflict with the decisions in Regan and in Forbes. The Forbes case, which was based on an extreme set of facts (a candidate with *no* public support), requires clarification to encourage appropriate minority participation in important political debates.

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

Jay B. Marcus
Mark A. Thompson
Counsel of Record for Petitioners
504 North Fourth Street, Suite 105
Fairfield, Iowa 52556
(515) 472-5945

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 96-3645

Jay B. Marcus;	*	
Marcus for Congress,	*	
a political committee;	*	
The Natural Law Party	*	
of Iowa, a political	*	
committee; Edward T. Rusk,	*	
of the Working Class Party;	*	
Michael Cuddehe; Michael	*	
Dimick; Rogers Badgett;	*	
Peter Lamoureux; Fred	*	Appeal from the
Gratzon; Susan Marcus,	*	United States District
Appellants,	*	Court for the
	*	Southern District
v.	*	of Iowa
	*	
Iowa Public Television,	*	
a state agency; Daniel K.	*	
Miller, in official capacity,	*	
Appellees.	*	

ORDER
Filed: July 30, 1998

Before BOWMAN, Chief Judge, McMILLIAN, RICHARD S. ARNOLD, FAGG, WOLLMAN, MAGILL, BEAM, LOKEN, HANSEN, MORRIS SHEPPARD ARNOLD, and MURPHY, Circuit Judges, en banc.

MAGILL, Circuit Judge.

In the autumn of 1996, Iowa Public Television (IPTV), a government-owned public television broadcaster, scheduled a series of joint appearances between Democratic and Republican candidates for seats in the U.S. House of Representatives. IPTV did not allow various third-party candidates for those seats to appear with the major-party candidates because it did not consider them to be newsworthy. The third-party candidates brought this suit seeking declaratory and injunctive relief allowing their appearance on the IPTV broadcasts, and the district court[1] denied relief. See Marcus v. Iowa Pub. Television, No. 4-96-CV-80690, 1996 WL 764143, at *4 (S.D. Iowa Oct. 9, 1996). The third-party

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[1]The Honorable Charles R. Wolle, United States District Judge for the Southern District of Iowa.

candidates appealed, and in the interim sought an emergency injunction from this Court. We denied interim relief, see Marcus v. Iowa Pub. Television, 97 F.3d 1137, 1138 (8th Cir. 1996), and now affirm the district court.

This case is controlled by the Supreme Court's decision in Arkansas Educational Television Commission v. Forbes, 118 S. Ct. 1633 (1998). In Forbes, the Supreme Court held that a political candidate debate program produced by a government-owned public television broadcaster was a non-public forum, see id. at 1643, and that the broadcaster could therefore limit participation in such a debate program where the limitation was viewpoint neutral and reasonable. See id. In this case, the district court did not clearly err in finding that the third-party candidates were not excluded on the basis of viewpoint, see Marcus, 1996 WL 764143, at *2, and we conclude that their exclusion was otherwise reasonable.

A true copy.

Attest:

CLERK,
U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 96-3645SIDM

Jay B. Marcus, et al.,	*	
Appellants,	*	Appeal from the
	*	United States
vs.	*	District Court for
Iowa Public Television,	*	the Southern
etc., et al.,	*	District of Iowa
Appellees.	*	

Appellants' motion for reconsideration of the Court's order of March 24, 1997, has been considered by the Court and is denied.

April 3, 1997

Order Entered at the Direction of the Court:
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals Eighth Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 96-3645SIDM

Jay B. Marcus, et al.,	*	
Appellants,	*	Appeal from the
	*	United States
vs.	*	District Court for
Iowa Public Television,	*	the Southern
etc., et al.,	*	District of Iowa
Appellees.	*	

Appellees' motion requesting oral argument in the referenced appeal has been considered by the court and is hereby denied.

October 11, 1996

Order Entered at the Direction of the Court:
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals Eighth Circuit

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 96-3645

Jay B. Marcus;	*	
Marcus for Congress,	*	
a political committee;	*	
The Natural Law Party	*	
of Iowa, a political	*	
committee; Edward T. Rusk,	*	
of the Working Class Party;	*	
Michael Cuddehe; Michael	*	
Dimick; Rogers Badgett;	*	
Peter Lamoureux; Fred	*	Appeal from the
Gratzon; Susan Marcus,	*	United States District
Appellants,	*	Court for the
	*	Southern District
v.	*	of Iowa
	*	
Iowa Public Television,	*	
a state agency; Daniel K.	*	
Miller, in official capacity,	*	
Appellees.	*	

ORDER

Filed: October 11, 1996

Before FAGG, MAGILL, and BEAM, Circuit Judges.

MAGILL, Circuit Judge.

Jay B. Marcus, Marcus for Congress; The Natural Law Party of Iowa, Edward T. Rusk, of the Working Class Party; Michael Cuddehe; Michael Dimick; Rogers Badgett; Peter Lamoureux; Fred Gratzon and Susan Marcus (Movants)[1] sought equitable relief against Iowa Public Television and one

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[1]Jay B. Marcus is the Natural Law Party of Iowa (NLP) candidate for United States Representative in Iowa's Third Congressional District; Rusk is the Working Class Party candidate for United States Representative in Iowa's Third Congressional District; Cuddehe is the NLP candidate for United States Representative in Iowa's First Congressional District; Dimick is the NLP candidate for United States Representative in Iowa's Fifth Congressional District; Badgett in the NLP candidate for United States Representative in Iowa's Fourth Congressional District; Lamoureux is the NLP candidate for United States Representative in Iowa's Second Congressional District; Gratzon is the NLP candidate f or the United States Senate in Iowa; and Susan Marcus is a registered voter in Iowa who wishes to see these aforementioned political candidates debate with Democratic, Republican, and other qualified congressional candidates on the Iowa ballot.

of its officials (IPTV) in the district court.[2] IPTV had scheduled "Joint appearances" of Democratic and Republican candidates for United States Representative for each of Iowa's five congressional districts on its program Iowa Press. Movants sought injunctive relief requiring IPTV to "include all legally qualified candidates in the joint appearances," Compl. at 10, as well as other injunctive and declaratory relief. The district court denied a preliminary injunction and, following a trial before the court and an advisory jury,[3] denied permanent injunctive relief. Movants' appeal of this denial of injunctive relief is pending before this Court.

IPTV has two scheduled joint appearances still to be broadcast. On Sunday, October 13, 1996, the Democratic and Republican candidates for United States Representative for Iowa's First Congressional District will appear on Iowa Press, and on Sunday, October 20, 1996, the Democratic and Republican candidates for United States Representative for Iowa's Fourth Congressional District will appear on Iowa Press. Movants have brought this motion for emergency injunctive relief before this Court, requesting that IPTV be

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[2]The Honorable Charles R. Wolle, United States District Judge for the Southern District of Iowa.

[3]Although seeking only equitable relief, the Movants filed a jury demand with the district court on September 27, 1996. The district court impaneled a jury "[w]ithout deciding whether the case presented issues properly triable to a jury," Mem. Op. at 2, and the district court made "the same findings [as the jury] based on its independent consideration of the evidence." Id. at 4.

enjoined from broadcasting these joint appearances "unless all legally qualified candidates are permitted to participate on an equal basis." Emergency Mot. at 1. Because we conclude that injunctive relief is not warranted at this point in this case, we deny the motion.

I.

IPTV is an Iowa state actor, and is governed under the provisions of Iowa Code § 256.80-256.90. IPTV produces and broadcasts Iowa Press, a "30-minute news and public affairs program [which] airs twice each Sunday at noon and 7:00 p.m." Movants App. at 14. Beginning on September 22 and running for a total of five weeks, Iowa Press scheduled "co-appearances by the major candidates seeking to represent Iowa's five congressional districts in the Iowa delegation in Washington D.C." Id. The major candidates were all Democrats or Republicans. Under the program's format, a host and a team of political reporters ask questions of the candidates, who would have an opportunity to present their views to the audience.

Movants made repeated requests to IPTV that they be allowed to participate in the joint appearances. IPTV declined to allow other candidates to participate in the scheduled joint appearances, concluding that they were not newsworthy. IPTV did offer to include Movants and other candidates to present their views on other programs presented by the network. Dissatisfied with this offer, Movants brought suit

against IPTV for injunctive and declaratory relief on September 13, 1996. The district court denied Movants' motion for preliminary injunctive relief on September 24, 1996, holding that they had failed to demonstrate irreparable harm and that they did not establish a likelihood of success on the merits.[4] Trial was set for September 30, 1996, and a jury was impaneled.

After the presentation of evidence, including witness and

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[4]The district court found that:

Plaintiffs have not proved irreparable harm or that on balance the harm they would suffer would outweigh the harm caused by granting an injunction. There is no showing in this record that their scheduled appearances on Iowa Public Television programs other than "Iowa press" would be less valuable to them. Voter attention given to a program aired closer to the time of the elections may well have a more favorable impact on voters than a presentation on the Iowa Press programs now planned. On balance, an injunction's harm to the exercise of defendants' journalistic discretion would outweigh any harm plaintiffs might suffer from not appearing on the planned Iowa Press shows.

Plaintiffs have not established a likelihood of success on the merits. The question of whether or not the planned Iowa Press programs featuring political candidates will constitute a debate under Forbes v. Arkansas Education Television Commission, [93 F.3d 497 (8th Cir. 1996) (Forbes II)], is a very close one.

The public has an interest in hearing the views of all legally qualified candidates. But the record here is that all candidates' views can adequately be presented on Iowa Public Television programs without requiring the requested appearances with other candidates on the scheduled Iowa Press programs. Moreover, there is a very strong public interest in allowing news broadcast journalists to exercise editorial discretion.

expert witness testimony, the jury returned a special verdict with a series of interrogatories. Based on an independent review of the evidence, the district court adopted the jury's findings, and made additional findings. The district court found that, although not intended by IPTV to be "debates," the scheduled joint appearances would be interpreted by reasonable persons viewing Iowa Press to be debates.

The district court also found that the Iowa Press programs were "bona fide news interview programs." Mem. Op. at 3. The district court noted that

> defendant network has been airing weekly Iowa Press appearances of public figures for over twenty years. The typical programs are not debates but simply journalists' interviews of persons in the news generally.

Id. at 5. The district court found that Movants had been excluded from the joint appearances "on the basis of independent journalistic and editorial judgments" by IPTV that the Movants were not newsworthy, id. at 4, and specifically held that Movants had failed to prove that their appearance on Iowa Press would be newsworthy. Id. The district court also held that IPTV did not base its decision to include certain candidates in the joint appearances based on the candidates' political affiliation, and that Movants were not excluded from the joint appearances based on their political affiliation or on the basis of their political views.

Based on these findings, the district court concluded that the Iowa Press programs constituted a limited public forum,

but that Movants' exclusion from the programs did not violate the First Amendment. IPTV served a compelling state interest, defined by IPTV's policies, by limiting the joint appearances to newsworthy candidates. The district court further held that the exclusion was narrowly tailored because, although not invited to appear on Iowa Press, Movants did have access to other programs presented by IPTV. The district court denied all relief, and Movants appealed. During the pendency of the appeal, Movants brought this motion before us.

> Whether a preliminary injunction should issue involves consideration of (1) the threat of irreparable harm to the movant; (2) the state of the balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest.

We address each of these issues in turn.

A.

The two remaining joint appearances scheduled on Iowa Press concern the First and Fourth Congressional District races. Only Movants Cuddehe and Badgett, the candidates for those races, would be directly affected by the grant of the requested injunctive relief. We therefore direct our inquiry into irreparable harm to these two Movants.

We agree with the district court that the access offered to

these Movants on other IPTV programs will be of significant value to the Movants, and might well have a more favorable impact on voters than the earlier airing of Iowa Press. See Order at 2. But see Trial Tr. at 73, reprinted in Movants' App. at Ex. G (expert testimony of Professor Mack Shelley that appearance in a debate is more valuable than a postdebate appearance). We disagree, however, that these Movants have failed to show irreparable harm.

Movants in this motion argue that their First Amendment right to express themselves in a limited public forum has been offended by their exclusion from the joint appearances on Iowa Press. If they are correct and their First Amendment rights have been violated, this constitutes an irreparable harm. See, e.g., Elrod v. Burns, 427 U.S. 347, 373 (1973) (plurality opinion) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."). This element of the Dataphase analysis is therefore satisfied.

We agree with the district court, however, that the balance of harms in this case weighs against issuing an injunction. Although a state actor, IPTV is a media organization, which necessarily must make editorial decisions regarding the content of its programming. Interference with that editorial discretion constitutes a significant injury to the editorial integrity of IPTV, which interferes with their primary mission of serving the public. See Mem. Op. at 7.

In addition, IPTV has represented that, if required to include other candidates in the Iowa Press joint appearances,

it will cancel the scheduled joint appearances entirely "rather than impair its journalistic integrity and its credibility with its viewers." Mem. in Opposition to Emergency Mot. at 3. We note that this is precisely the step taken by the Nebraska Education Television Network in August 1996, when it cancelled a scheduled debate between certain senatorial candidates rather than include uninvited candidates or face litigation. We find that the threat of possible harm to IPTV is substantial if the requested injunction were to issue, and is greater than the harms faced by Movants.

C.

We also do not believe that Movants have demonstrated likelihood of success on the merits. In this case, "success on the merits" means that we would reverse the district court on appeal. We do not lightly assume district court error, particularly where, as in the appeal pending before this Court, the district court's judgment shall be reviewed for abuse of discretion. See Pottgen v. Missouri State High Sch. Activities Ass'n, 40 F.3d 926, 929 (8th Cir. 1994).

Accepting for the purposes of this motion that the joint appearances are debates and that IPTV has opened Iowa Press as a limited public forum to qualified congressional candidates, see Mem. Op. at 5-6, IPTV's regulation of speaker access "Survive[s] only if [it is] narrowly drawn to achieve a compelling state interest." International Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678 (1992).

IPTV presented evidence, and the district court found, that IPTV limited speaker access to the joint appearances on Iowa Press on the basis of the newsworthiness of the candidates. The district court held that IPTV had a compelling interest in presenting newsworthy programs, stating that:

> It is profoundly important that the defendant network and its new editors be allowed to exercise independent journalistic and editorial judgments based on newsworthiness. If the defendant network may not exercise editorial discretion in determining the content of its programs, the network would be fundamentally bland and of little value to the public it serves.

Mem. Op. at 7.

Movants argue that IPTV has no compelling interest in limiting speaker access, and rely heavily on our decision in Forbes v. Arkansas Educational Television Commission, 93 F.3d 497 (8th Cir. 1996) (Forbes II) . In Forbes II, we held that an independent candidate could not be excluded from a debate broadcast on a state operated public television station because he was not a "viable" candidate. See id. at 504-05. Reasoning that Arkansas law itself defined "viability" as being qualified as a candidate, we determined that the independent candidate had been excluded from the debate only because "in the opinion of the network, he could not win." Id. at 504. Relying on Families Achieving Independent and Respect v. Nebraska Department of Social Services, 91 F. 3d 1076 (8th Cir. 1996), a decision which has recently been

vacated pending rehearing by the Court en banc, the Forbes II Court stated that:

> We have no doubt that the decision as to political viability is exactly the kind of journalistic judgment routinely made by newspeople. We also believe that the judgment in this case was made in good faith. But a crucial fact here is that the people making this judgment were not ordinary journalists: they were employees of government. The First Amendment exists to protect individuals, not government. The question of political viability is, indeed, so subjective, so arguable, so susceptible of variation in individual opinion, as to provide no secure basis for the exercise of governmental power consistent with the First Amendment.

93 F.3d at 505. Movants reason that, because this case also involves the exclusion of a candidate based on a "subjective" determination of newsworthiness, see Trial Tr. at 296 (testimony of Mike Newell, Producer for Iowa Press), it must also be an improper exercise of governmental authority. We disagree.

Forbes II cannot be read to mandate the inclusion of every candidate on the ballot for any debate sponsored by a public television station. Nor does Forbes II suggest that public television station administrators, because they are government actors, have no discretion whatsoever in making broadcast determinations. Rather, Forbes II held that there was no

compelling interest in excluding statutorily-defined viable candidates from a debate based on the viability of the candidate. Unlike "viability," which is ultimately for the voters to decide, "newsworthiness" is peculiarly a decision within the domain of journalists.

Relying on Regan v. Time, Inc., 468 U.S. 641 (1984), Movants assert that "newsworthiness" is an inherently improper basis for determining access.[5] Regan involved criminal statutes for photographing obligations or securities of the United States, see id. at 643, and we agree that the "newsworthiness" of a message could not be a proper basis for determining whether a speaker should be criminally liable for speech. In the instant case, however, we deal with a government agency which is also a media organ. By its very

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[5]The Regan Court stated:

> A determination concerning the newsworthiness or educational value of a photograph cannot help but be based on the content of the photograph and the message it delivers. Under [18 U.S.C. §§ 474, 504(l)], one photographic reproduction will be allowed and another disallowed solely because the Government determines that the message being conveyed in the one is newsworthy or educational while the message imparted by the other is not. The permissibility of the photograph is therefore often dependent solely on the nature of the message being conveyed. Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment.

468 U.S. at 648-49 (quotations and citation omitted).

nature and under controlling policies, IPTV must be concerned with the newsworthiness of the issues and speakers included in its programming. Pursuant to Iowa Code § 256.82(3), IPTV's advisory committee on journalistic and editorial integrity is "governed by the national principles of editorial integrity developed by the editorial integrity project." Id. "Editorial integrity in public broadcasting programming means the responsible application by professional practitioners of a free and independent decision-making process which is ultimately accountable to the needs and interests of all citizens." Statement of Principle of Editorial Integrity in Public Broadcasting, the Editorial Integrity Project, reprinted in Respondents' App. at Ex. 4 (Statement of Principles). The Statement of Principles provides that:

> In order to assure that programs meet the standards of editorial integrity the public has a right to expect, the following five principles and guidelines establish a foundation for trustee action. . . . The ultimate goal of the principles and guidelines is to assist public broadcasting trustees in fulfilling their vital role in this important public service.

Id. These five principles are: (I) We are Trustees of a Public Service; (II) Our Service is Programming; (III) Credibility is the Currency of our Programming; (IV) Many of our Responsibilities are Grounded in Constitutional or Statutory Law; and (V) We Have a Fiduciary Responsibility for Public Funds. Id. The guideline to Principle III, Credibility is the

Currency of our Programming, instructs that:

> The process of developing programs to meet the audience's needs must function under clear policies adopted and regularly reviewed by the trustees. This process must be managed by the professional staff according to generally accepted broadcasting industry standards, so that the programming service is free from pressure from political or financial supporters. The station's chief executive officer is responsible for assuring that the program decisions are based on editorial criteria, such as fairness, objectivity, balance and community needs; not on funding considerations.

Id. In adhering to these guidelines, IPTV has created a programming policy, which provides that:

> In the presentation of public affairs programming, Iowa Public Television should maintain maximum objectivity and fairness. Iowa Public Television should strive for a better informed citizenry of the state of Iowa, through the presentation of important and significant issues.

Resp't's App. at Ex. 3 (emphasis added).

In meeting these policies, IPTV has limited access to the Iowa Press joint appearances to newsworthy candidates. Although a determination of newsworthiness is based on journalistic discretion, and is therefore somewhat subjective, there are clearly objective elements of newsworthiness. Daniel K. Miller, the Director of Programming and

Production for IPTV, testified at length in his deposition to the elements which inform a professional editorial judgment that a candidate's appearance is "newsworthy":

> [N]ewsworthiness has a number of elements, I think. Is this candidate or this campaign, is it active in the region that it's running for? If it's a statewide campaign, for example, is it active in all of Iowa's 99 counties or in a majority of them? Does it have--my phrase, not a good one--an organization of volunteers, campaign organization beyond the campaign staff? If the candidate or campaign or party has had previous exposures to elective offices, how have they done? If they have done well, what is well? Are they growing? Is there growth in their success at the polls? Have they had previous exposure to elective office? Are they seeking the office actually to be elected to it or do they say that they are seeking it to bring ideas into the marketplace? How has their fundraising been? Is it a broad base? Do they have a lot? Do they have little? Whatever. How are they treated by other media organizations? Have their efforts generated news in other media organizations or if there are debates, have they been included in those debates by other news organizations? What are we hearing? What are we hearing either from the public or what are we hearing from the campaigns themselves? Are

people calling us and saying you know, "Such and such had a crowd of 550 last night," or are they calling us and saying, "Such and such had a crowd of five." The last part, are we hearing anything? What are we hearing from the campaigns themselves? Politics is an enterprise that relies on the ability of its participants to sell themselves, to retail themselves. What are we hearing along that line? Do we hear a lot from the candidates themselves? Are they calling us? Are they faxing us? Are we getting encouraged by their supporters who happen to be people we know or people we don't know to pay attention to their campaigns? Do we see early indications of retail efforts in that regard in the media? Are they buying newspaper or radio ads?

Dep. at 22-24, reprinted in Movants' App. at Ex. C. Professor Barbara Mack, an expert witness for IPTV, testified regarding journalistic standards of newsworthiness:

When I teach freshmen journalists about what is meant by newsworthiness, what makes someone newsworthy, you talk about the--the quality that that person or that news event has.

Is that news event going to have an impact on the people who read your newspaper or who watch your television station? Is it going to change their lives? Does it have the potential to change their lives? Is it something which is a

public conflict? Conflict is one of our classic new values. Impact is a classic news value.

We talk about the news--the news value of locality. As strange as it may seem, a bus accident that occurs in India will get very little coverage in the Des Moines Register, but a bus accident that occurs in downtown Des Moines at rush hour, even though it may injure fewer people, will get more new coverage. Why? Because it's local, and local news has importance.

We talk about the value of human interest, and many of the stories that most people think of as feature stories are human interest stories. They appeal to the characteristics of the human spirit.

So when a journalist is making a decision about what is or is not news, there is always a very careful evaluation of each of those factors.

Trial Tr. at 355-56.

As found by the district court, IPTV properly determined that none of the Movants were newsworthy, see Mem. Op. at 4. The district court found that:

> Defendants properly took into account in determining newsworthiness . . . their study of the feeble efforts of the plaintiff candidates to raise funds or express efforts in their campaigns to generate public support for their candidacies.

Id. at 8-9.

We agree that IPTV has a compelling interest, in meeting its public service goals, of limiting access to newsworthy candidates. We further agree that its methods were narrowly suited to achieving this goal, and left substantial access to other fora offered by IPTV. We therefore do not believe that Movants have demonstrated a likelihood of success on the merits.

D.

We agree with the district court that there is a public interest in hearing all qualified candidates present their views. However, there is also a public interest in having a debate between some candidates rather than having no debate whatsoever. In addition, we believe that IPTV's professional broadcasters are generally better aware of what constitutes appropriate programming than a group of federal judges; it is clearly in the public interest in having a state-operated public television free of unnecessary interference by a federal court. on balance, therefore, we believe that the public interest supports denying this injunction.

III.

For the reasons stated above, we deny the emergency motion for injunctive relief.

BEAM, Circuit Judge, dissenting.

The court (and the district court as well) seeks to distinguish the indistinguishable. Thus, I dissent.

The binding precedent at work in this case is found in Forbes v. Arkansas Educ. Television Comm'n, 93 F.3d 497 (8th Cir. 1996). Forbes (as are the plaintiffs in this case) was a legally qualified candidate for Congress from the Third District of Arkansas. Also, as here, he was shut out of a debate between the Republican and Democratic candidates for the Third District seat televised on Arkansas Educational Television. The basis for the exclusion was that Forbes was not a "viable" candidate.

Chief Judge Richard S. Arnold, for a unanimous panel, rejected, as unconstitutional, this governmental action, saying:

> We have no doubt that the decision as to political viability is exactly the kind of journalistic judgment routinely made by newspeople. We also believe that the judgment in this case was made in good faith. But a crucial fact here is that the people making this judgment were not ordinary journalists: they were employees of government. The First Amendment exists to protect individuals, not government. The question of political viability is, indeed, so subjective, so arguable, so susceptible of variation in individual opinion, as to provide no secure basis for the exercise of governmental power consistent with the First Amendment.

Id. at 505.

In my view, there can be no realistic argument advanced that a subjective opinion by a government employee that a candidate is or is not "newsworthy" is different from a subjective conclusion that he or she is or is not "politically viable." The inquiry involves two peas from the same analytical pod. Forbes requires us to grant the emergency injunction requested in this case.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF IOWA
CENTRAL DIVISION

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

JAY B. MARCUS, MARCUS FOR CONGRESS, THE NATURAL LAW PARTY OF IOWA, EDWARD T. RUSK OF THE WORKING CLASS PARTY, EDWARD T. RUSK FOR CONGRESS, MICHAEL CUDDEHE, MICHAEL DIMICK, ROGERS BADGETT, PETER LAMOUREUX, FRED GRATZON, and SUSAN MARCUS, Plaintiffs, vs. IOWA PUBLIC TELEVISION, A STATE AGENCY, and DANIEL K. MILLER in his official capacity, Defendants.	) NO. 4-96-CV-80690) FINDINGS OF FACT,) CONCLUSIONS OF) LAW, AND JUDGMENT) DISMISSING) COMPLAINT

The plaintiffs filed this action on September 13, 1996, alleging that the defendant public television network and its

director of programming and production had infringed their constitutional rights arising under the First Amendment. The plaintiffs sought to have the seven plaintiffs who are qualified candidates for election to the Congress (hereafter the plaintiff candidates) included in programs scheduled to be aired on the six weekends leading up to the November 1996 general election. The plaintiffs also sought injunctive relief requiring the network to retract or correct its statement in a program guide referring to Republican and Democratic party candidates as "the major candidates."

Recognizing that the case might soon become moot, the court promptly held a hearing but then denied the plaintiffs' request for preliminary injunctive relief. The court then scheduled trial to begin on September 30, 1996. On September 27, plaintiffs filed a jury demand. Without deciding whether the case presented issues properly triable to a jury, the court commenced trial by impaneling a jury on September 30. The court informed the parties that the jury's verdicts would at least be considered advisory and might be deemed binding on all fact issues if the court concluded the Seventh Amendment gave the parties a right to trial by jury.

I. The Facts.

The parties stipulated many background facts, here repeated in the form set forth in the court's instructions to the jury:

> The plaintiff, Jay B. Marcus, is a duly qualified candidate of the Natural Law Party for U.S. Representative in Iowa's Third Congressional

District.

Michael Cuddehe, Peter Lamourex, Rogers Badgett, and Michael Demick are the duly qualified candidates of the Natural Law Party for U.S. Representative in Iowa's First, Second, Fourth, and Fifth Congressional Districts, respectively.

Marcus for Congress is a political committee formed in 1996 to promote the election of Jay B. Marcus for U.S. Representative. The Natural Law Party of Iowa is a political committee formed to bring a scientific perspective into government and to promote the election of Natural Law Party candidates for public office.

Edward T. Rusk is a duly qualified candidate of the Working Class Party for U.S. Representative in Iowa's Third Congressional District. Edward T. Rusk for Congress is a political committee formed to promote the election of Edward T. Rusk for U.S. Representative.

Fred Gratzon is a duly qualified candidate of the Natural Law Party for U.S. Senate in Iowa.

Susan Marcus is a registered voter in Iowa who desires to hear the candidates who are parties to this action participate in forums with the Republican and Democratic candidates and all other legally qualified candidates on the Iowa

Press show.

The defendant, Iowa Public Television, is a state agency. Daniel K. Miller is the Director of Programming and Production for Iowa Public Television and is a state employee. Dave Bolender is the Executive Director of Iowa Public Television and is a state employee. Michael Newell is an agent of Iowa Public Television who produces the television show Iowa Press.

The court submitted eight special verdict questions to the jury, and the jury answered each as follows:

1. Have the plaintiffs proved that the Iowa Press programs involving Iowa Congressional candidates [hereinafter "the Iowa Press programs"] are "debates"? Ans: Yes

2. Have the defendants proved that the Iowa Press programs are bona fide news interview programs? Ans: Yes

3. Have the plaintiffs proved that the defendants did not act in accordance with a predetermined policy in deciding whom to invite to participate on the Iowa Press programs? Ans: No

4. Have the plaintiffs proved that the defendants based their decisions on whom they would invite to participate on the Iowa Press programs solely on whether the candidates had been nominated by the Republican or Democratic parties? Ans: No

5. Have any of the plaintiff candidates proved that

the plaintiff candidates' appearance on an Iowa Press program would be newsworthy?

Jay B. Marcus	Ans: No
Edward T. Rusk	Ans: No
Michael Cuddehe	Ans: No
Michael Demick	Ans: No
Rogers Badgett	Ans: No
Peter Lamourex	Ans: No
Fred Gratzon	Ans: No

6. Have the plaintiffs proved that the defendants excluded the plaintiff candidates from the Iowa Press programs because defendants disagreed with their opinions on political issues? Ans: No

7. Have the defendants proved that the defendants excluded the plaintiff candidates from the Iowa Press programs on the basis of independent journalistic and editorial judgments the defendants made based on newsworthiness? Ans: Yes

8. Have the defendants proved that the defendants intended to open the Iowa Press programs only to those Congressional candidates whom the defendants invited to appear? Ans: Yes

The court need not decide whether the jury's findings were advisory only. Each of the jury's answers to the special verdict questions was fully supported by evidence in the record. The court makes the same findings based on its independent consideration of the evidence, including its assessment of the credibility of the parties who testified, the

expert witnesses, and other witnesses. The court finds defendant Miller's testimony credible concerning the reasons the plaintiff candidates were not included in the Iowa Press programs.

With hindsight, the court would have asked the jury one additional question concerning the defendants' intent in selecting persons for the Iowa Press program. I believe that I should have asked the jury, as a follow-up question to special verdict question No. 1:

> Have the plaintiffs proved that the defendants intended the Iowa Press programs to be "debates"?

I find the defendants did not intend the programs to be debates. The defendant network has been airing weekly Iowa Press appearances of public figures for over twenty years. The typical programs are not debates but simply journalists' interviews of persons in the news generally. This is consistent with the jury's answers to special verdict questions 2 and 8, finding that the Iowa Press candidate interviews are bona fide news interview programs and that defendants opened these programs only to those congressional candidates defendants invited to appear.

Nevertheless, I conclude that reasonable persons viewing the programs would have found the joint appearances of candidates on the Iowa Press programs to be "debates," using the definition in jury instruction No. 13. Iowa Press interviews of the candidates were staged to give the public the opportunity to receive the views of the candidates interviewed on the programs, and the programs were regulated by the

moderator and journalists asking questions. So the Iowa Press programs were debates.

II. Conclusions of Law.

1. The Iowa Press programs constituted limited public forums, because they were political debates staged by a public television network. See Forbes v. Arkansas Educational Television Communication Network, ___F.2d___ (8th Cir. 1996) (slip opinion p. 12) (hereafter Forbes II] ; cf. Cornelius v. NAACP Legal Defense & Education Fund, Inc., 473 U.S. 788, 804-06 (1985) (whether government created limited public forum turns on its intent).

2. Plaintiffs have not established their First Amendment rights were violated. Persons presenting political viewpoints on a public television network may be excluded from staged debates if the exclusion is narrowly tailored and will serve compelling state interests. Forbes II at p. 15.

3. Defendants excluded the plaintiff candidates for principled reasons based on a sufficient state interest. See Forbes v. Arkansas Educational Television Commission, 22 F.3d 1423, 1429 (8th Cir. 1994), cert. denied, 115 S. Ct. 500 & 1962 (1995). The jury's findings and the court's findings of fact support this conclusion. Defendants did not exclude the plaintiff candidates arbitrarily but based the decision on a pre-determined policy. Defendants did not base their selection on whether persons to appear on the Iowa Press programs had been nominated by the Republican or Democratic parties, nor whether defendants disagreed with the candidates' opinions on political issues. The decision was based on the defendants'

reasoned determination that the Iowa Press programs are bona fide news interview programs; and in defendant Miller's professional editorial judgment not one of the plaintiff candidates was newsworthy. It is profoundly important that the defendant network and its news editors be allowed to exercise independent journalistic and editorial judgments based on newsworthiness. If the defendant network may not exercise editorial discretion in determining the content of its programs, the network would be fundamentally bland and of little value to the public it serves. So defendants proved they were serving a compelling state interest in excluding the plaintiff candidates from the Iowa Press programs. See FCC v. League of Women Voters, 468 U.S. 363, 367 (1984); Barnard v. Chamberlain, 897 F.2d 1059 (10th Cir. 1990); Muir v. Alabama Ed. Television Comm., 688 F.2d 1033, 1040 (5th Cir. 1982), cert. denied, 460 U.S. 1023 (1983).

4. Iowa statutes, received in evidence as exhibits, created the defendant network to be and operate as an institution of the press to serve the people of Iowa, free from political pressure from within or from without state government. Applicable Iowa law expresses a compelling governmental purpose in having the defendant network operate according to the Communications Act of 1934 and the rules and policies of the Federal Communications Commission adopted under that federal statute. See FCC v. League of Women Voters, 468 U.S. 363, 378 (1984).

5. Defendants' exclusion of the plaintiff candidates was narrowly tailored. The plaintiff candidates

were granted the opportunity to present their views on other programs presented by the network, based on Federal Communications Act equal access rules, and they are scheduled to appear on an upcoming Iowa Press program presenting views of congressional candidates not invited to the Iowa Press programs here at issue. Defendants proved by credible expert testimony that the defendant network's exercise of journalistic discretion meets generally accepted broadcast industry standards for making judgments about newsworthiness, as required by the "Statement of Principles of Editorial Integrity in Public Broadcasting," a document received in evidence in this case.

6. The court disagrees with plaintiffs' contention that Forbes II is dispositive of this case. Forbes II is distinguishable. There the court held that the Arkansas public television network excluded the plaintiff Forbes, a congressional candidate, solely because network personnel deemed him not a viable political candidate. Here, in contrast, the court and the jury have found credible the defendant Miller's explanation that lack of newsworthiness and not lack of viability of the plaintiff congressional candidates was the basis for the defendants' decision not to invite the plaintiff candidates. Defendants acknowledged that the plaintiff candidates were qualified to have their names on the ballot and therefore were viable candidates. Defendants properly took into account in determining newsworthiness, however, their study of the feeble efforts of the plaintiff candidates to raise funds or express efforts in their campaigns

to generate public support for their candidacies. In Forbes II the court held that the defendant network did not have a compelling and narrowly tailored reason for excluding the plaintiff from a debate when it simply deemed the plaintiff Forbes a person who was not a "viable candidate." Id. at p. 14. Forbes II is therefore inapposite.

III. Judgment.

The clerk of court shall enter judgment in favor of the defendants and against the plaintiffs. dismissing this action at plaintiffs' costs.

IT IS SO ORDERED.

Dated this 9th day of October, 1996.

/s/ Charles R. Wolle
CHARLES R. WOLLE, JUDGE
UNITED STATES DISTRICT COURT

JURY INSTRUCTION NO. 15

For the purposes of this case, the term "newsworthy" means material or persons, considered for broadcast on a television network, that are sufficiently interesting to the network's audience and the general public to warrant presenting the material in the network's news programs.

APPENDIX C

STATUTES

First Amendment to the U.S. Constitution

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment to U.S. Constitution

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 USC Sec. 1254

Courts of appeals; certiorari; certified questions. Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of

any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

28 USC Sec. 1331

Federal question. The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 USC Sec. 1343

Civil rights and elective franchise.

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

(b) For purposes of this section -

(1) the District of Columbia shall be considered to be a State; and

(2) any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

28 USC Sec. 2201
Creation of remedy.

(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or

in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section 516A(f)(10) of the Tariff Act of 1930), as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

(b) For limitations on actions brought with respect to drug patents see section 505 or 512 of the Federal Food, Drug, and Cosmetic Act.

28 USC Sec. 2202

Further relief. Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

42 USC Sec. 1983

Civil action for deprivation of rights. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United

States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Code of Iowa Sec. 256.3

State board established. The state board of education is established for the department. The state board consists of nine members appointed by the governor subject to senate confirmation. The members shall be registered voters of the state and hold no other elective or appointive state office. A member shall not be engaged in professional education for a major portion of the member's time nor shall the member derive a major portion of income from any business or activity connected with education. Not more than five members shall be of the same political party.

The terms of office are for six years beginning and ending as provided in section 69.19.

Three of the state board members shall have substantial knowledge related to the community college system. The remaining six members shall be members of the general public.

Code of Iowa Sec. 256.81
Public broadcasting division
created—administrator—duties.

1. The public broadcasting division of the department of education is created. The chief administrative officer of the division is the administrator who shall be appointed by and serve at the pleasure of the Iowa public broadcasting board. The governor shall set the division administrator's salary unless otherwise provided by law. Educational programming shall be the highest priority of the division. The director of the department of education and the state board of education are not liable for the activities of the division of public broadcasting.

2. The administrator shall do all of the following:

a. Direct and organize the activities of the division.

b. Submit a biennial report to the governor on the activities and an evaluation of the division and its programs and policies.

c. Control all property of the division.

d. Perform other duties imposed by law.

Code of Iowa Sec. 256.82
Board—advisory committees.

1. The Iowa public broadcasting board is created to plan, establish, and operate educational radio and television facilities and other telecommunications services including narrowcast and broadcast systems to serve the educational needs of the state. The board shall be composed of nine members selected in the following manner:

a. Four members shall be appointed by the governor so that the portion of the board membership appointed under this paragraph includes two male board members and two female board members at all times:

(1) One member shall be appointed from the business community other than the commercial broadcasting industry and the telecommunications industry.

(2) One member shall be appointed from the commercial broadcast industry.

(3) One member shall be appointed from the

membership of a fund-raising nonprofit organization financially assisting the Iowa public broadcasting division.

(4) One member shall represent the general public

b. Five members shall be selected in the manner provided in this paragraph and the gender balance of the membership shall be coordinated among the associations and boards making the appointments so that not more than three members serving under this paragraph at the same time are of the same gender.

(1) One member shall be appointed by the state association of private colleges and universities.

(2) One member shall be appointed jointly by the superintendents of the community colleges created by chapter 260C.

(3) One member shall be appointed jointly by the administrators of the area education agencies created by chapter 273.

(4) One member who is knowledgeable about telecommunications shall be appointed by the state board of regents.

(5) One member shall be appointed by the state board

of education.

2. Board members shall serve a three-year term commencing on July 1 of the year of appointment. A vacancy shall be filled in the same manner as the original appointment for the remainder of the term.

Membership on the board does not constitute holding a public office and members shall not be required to take and file oaths of office before serving. A member shall not be disqualified from holding any public office or employment by reason of appointment to the board nor shall a member forfeit an office or employment by reason of appointment to the board.

3. The board shall appoint an advisory committee on journalistic and editorial integrity which has no more than a simple majority of members of the same gender. The division shall be governed by the national principles of editorial integrity developed by the editorial integrity project.

Duties of the advisory committee, and of additional advisory committees the board may from time to time appoint, shall be specified in rules of internal management adopted by the board.

Members of advisory committees shall receive actual expenses incurred in performing their official duties.

Code of Iowa Sec. 256.84
Powers—facilities—rules.

1. The board may purchase, lease, and improve property, equipment, and services for educational telecommunications including the broadcast and narrowcast systems, and may dispose of property and equipment when not necessary for its purposes. The board and division administrator may arrange for joint use of available services and facilities.

2. The board shall apply for channels, frequencies, licenses, and permits as necessary for the performance of the board's duties.

3. This section does not prohibit institutions under the state board of regents and community colleges under the department of education from owning, operating, improving, maintaining, and restructuring educational radio and television stations and transmitters now in existence or other educational narrowcast telecommunications systems and services. The institutions and schools may enter into agreements with the board for the lease or purchase of equipment and facilities.

4. The board may locate its administrative offices and production facilities outside the city of Des Moines.

5. The board shall adopt and update a design plan for educational telecommunications systems and services in this state. The design plan shall be updated at least every two years. Copies of the design plan and updated design plan shall be made available to the governor and members of the general assembly upon request. The plan shall include a list of public utilities and private telecommunications companies being utilized by the educational telecommunications system; the cost of the system; the fees or charges established for the system; and information on areas where construction is required because facilities are not available from private telecommunications companies.

6. The board shall establish guidelines for and may impose and collect fees and charges for services. Fees and charges collected by the board for services shall be deposited to the credit of the division. Any interest earned on these receipts, and revenues generated under subsection 7, shall be retained and may be expended by the division subject to the approval of the board.

7. The board may make and execute agreements, contracts, and other instruments with any public or private entity and may retain revenues generated from these contracts. State departments and agencies, other public agencies, and governmental subdivision and private entities including but not limited to institutions of higher education and nonpublic schools may enter into contracts and otherwise cooperate with

the board.

8. The board may contract with engineers, attorneys, accountants, financial experts, and other advisors upon the recommendation of the administrator. The board may enter into contracts or agreements for such services with local, state, or federal governmental agencies.

9. The board may adopt rules to implement and administer the programs of the division.

10. The decision of the board is final agency action under chapter 17A.

Code of Iowa Sec. 262.2

Appointment—term of office. The members [of the board of regents] shall be appointed by the governor subject to confirmation by the senate. The term of each member of the board shall be for six years. the terms of three members of the board shall begin and expire in each odd-numbered years as provided in section 69.19.

(2)

Supreme Court, U.S.
FILED
NOV 30 1998
CLERK

No. 98-710

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1998

JAY B. MARCUS, MARCUS FOR CONGRESS, THE NATURAL LAW PARTY OF IOWA, EDWARD T. RUSK OF THE WORKING CLASS PARTY, EDWARD T. RUSK FOR CONGRESS, MICHAEL CUDDEHE, MICHAEL DIMICK, ROGERS BADGETT, PETER LAMOUREUX, FRED GRATZON, and SUSAN MARCUS,

Petitioners,

v.

IOWA PUBLIC TELEVISION, A STATE AGENCY, and DANIEL K. MILLER IN HIS OFFICIAL CAPACITY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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November 30, 1998

15pp

QUESTION PRESENTED

Whether this Court should reexamine the questions decided last Term in *Arkansas Educational Television Commission v. Forbes*, 118 S. Ct. 1633 (1998)?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

INTRODUCTION 1

OPINIONS BELOW 1

STATEMENT OF THE CASE 2

ARGUMENT 5

I. *FORBES* PROTECTS THE EDITORIAL DECISIONS OF STATE-OWNED PUBLIC TELEVISION STATIONS THAT SPONSOR CANDIDATE DEBATES 5

II. THE DISTRICT COURT'S FINDINGS OF FACT AND LAW, AS AFFIRMED BY THE COURT OF APPEALS, SATISFY THE *FORBES* TEST 6

CONCLUSION 10

APPENDIX
ORDER OF THE U.S. COURT OF APPEALS FOR THE EIGHTH CIRCUIT, MARCH 24, 1997

TABLE OF AUTHORITIES

CASES

Arkansas Educational Television Commission v. Forbes, 118 S. Ct. 1633 (1998) . . . . . *passim*

Regan v. Time, Inc., 468 U.S. 641 (1984) 8

Columbia Broadcasting System v. Democratic National Committee, 412 U.S. 94 (1973) 7, 8

Marcus v. Iowa Public Television, 150 F.3d 924 (8th Cir. 1998) (en banc) 1,7

Marcus v. Iowa Public Television, 97 F.3d 1137 (8th Cir. 1996) . . . . . *passim*

Marcus v. Iowa Public Television, No. 4-96-CV-80690, 1996 WL 764143 (S.D. Iowa, Oct. 9, 1996) . . *passim*

STATUTE

Iowa Code § 256.82(3) 9

INTRODUCTION

Petitioners do not establish a compelling reason for granting certiorari. Petitioners do not, and cannot, point to any conflict between courts or to any departure from the accepted and usual course of judicial proceedings. Sup. Ct. R. 10. Neither do they identify any "important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c). Just last Term, this Court settled the same issues in *Arkansas Educational Television Commission v. Forbes*, 118 S. Ct. 1633 (1998), and this case presents no new important or unsettled questions. Indeed, in the court below – before this Court reversed the Eighth Circuit's decision in Forbes – Petitioners argued that "[t]his case is indistinguishable from the recent eighth circuit [*sic*] case [of *Forbes*]." Appellants' Brief to the Court of Appeals, filed Nov. 14, 1996, at 13.

OPINIONS BELOW

The decision of the U.S. District Court for the Southern District of Iowa is reported at 24 Med. L. Rpt. 2531 (S.D. Iowa 1996) and at 1996 WL 764143. The Eighth Circuit's denial of emergency injunctive relief is reported at 97 F.3d 1137 (8th Cir. 1996). The Eighth Circuit's order holding this case in abeyance pending this Court's decision in *Arkansas Educational Television Commission v. Forbes* was entered on March 24, 1997 (Appendix ("App.") i). The decision of the Eighth Circuit affirming the District Court's dismissal is reported at 150 F.3d 924 (8th Cir. 1998).

STATEMENT OF THE CASE

Respondents are a state-owned public broadcaster, Iowa Public Television ("IPTV"), and its programming director, Daniel K. Miller. IPTV broadcasts a weekly program entitled "*Iowa Press*," in which members of the press question invited guests about topics of public interest. In 1996, IPTV decided to broadcast a series of programs on *Iowa Press* with congressional candidates as guests. After considering which guests would be most interesting to the viewing audience, Respondents did not invite Petitioners – candidates in the 1996 election – to participate in the programs. Respondents made their decision on the basis of a predetermined policy and based upon their professional editorial judgment that Petitioners were not newsworthy.

Petitioners (Plaintiffs below) brought an action in the United States District Court for the Southern District of Iowa alleging infringement of their First Amendment rights and seeking injunctive relief. The District Court denied Petitioners' request for preliminary injunctive relief and, ultimately, dismissed Petitioners' action for injunctive relief. Though declining to decide whether the parties were entitled to a trial by jury, the District Court submitted eight special verdict questions to the jury. The District Court found that "[e]ach of the jury's answers to the special verdict questions was fully supported by the evidence in the record," and the court made the same findings based upon an "independent consideration of the evidence." *Marcus v. Iowa Public Television*, No. 4-96-CV-80690, 1996 WL 764143, at *2 (S.D. Iowa Oct. 9, 1996).

The jury found, among other things, that Petitioners failed to prove that they had been excluded by IPTV based

upon their political viewpoints. Instead, the jury found that Petitioners were excluded "on the basis of independent journalistic and editorial judgments the [Respondents] made based on newsworthiness." *Id.* The court applied the "strict scrutiny" standard for limited public fora, and found that the "network's exercise of journalistic discretion [met] generally accepted broadcast industry standards for making judgments about newsworthiness, as required by the 'Statement of Principles of Editorial Integrity in Public Broadcasting.'" *Id.* at *3-*4.

Petitioners filed an emergency motion for injunctive relief in the United States Court of Appeals for the Eighth Circuit. This, too, was denied, as Petitioners failed to demonstrate a likelihood of success on the merits. Furthermore, though acknowledging that a determination of newsworthiness is based on journalistic discretion, the Court of Appeals noted that "there are clearly objective elements of newsworthiness." *Marcus v. Iowa Public Television*, 97 F.3d 1137, 1143 (8th Cir. 1996). The panel concluded "that IPTV's professional broadcasters are generally better aware of what constitutes appropriate programming than a group of federal judges; it is clearly in the public interest in having a state-operated public television free of unnecessary interference by a federal court." *Id.* at 1144.

On March 24, 1997, the Eighth Circuit, on its own motion, removed this case from the Court's en banc oral argument calendar (App. i). The Court of Appeals ordered that further proceedings in this appeal be held in abeyance pending this Court's decision in *Forbes*.

In *Forbes*, this Court held that a political candidate debate program produced by a state-owned broadcaster was a non-

public forum, and that the state-owned broadcast licensee could limit participation in the debate program in a viewpoint-neutral and reasonable manner. *Forbes* was decided last Term, and, shortly thereafter, after receiving supplemental briefs but without hearing oral argument, the Eighth Circuit, in a two-page en banc opinion, affirmed the District Court's dismissal of *Marcus,* 1996 WL 764143. *Marcus v. Iowa Public Television*, 150 F.3d 924 (8th Cir. 1998) (en banc). The Court of Appeals held that *Marcus* is controlled by *Forbes*. *Marcus*, 150 F.3d at 925. Moreover, the Court of Appeals found that the District Court did not clearly err in finding that the Petitioners "were not excluded on the basis of viewpoint," and that the Petitioners' "exclusion was otherwise reasonable." *Id.*

ARGUMENT

I. *Forbes* Protects the Editorial Decisions of State-Owned Public Television Stations that Sponsor Candidate Debates.

The issues raised by the Petitioners in this case were resolved in *Forbes*, 118 S. Ct. 1633, and this case presents no unsettled issues. In *Forbes*, a state-owned public broadcaster sponsored a debate for Arkansas' Third District candidates for the House of Representatives. The broadcaster invited the major party candidates but, after considering the lack of public interest in Forbes' campaign, did not invite Forbes to participate. The Eighth Circuit held that Forbes had a First Amendment right to participate, and this Court reversed. This Court held that the debate was a non-public forum, and that Forbes' exclusion was a "reasonable, viewpoint-neutral exercise of journalistic discretion consistent with the First Amendment." *Id.* at 1644.

"Although public broadcasting as a general matter does not lend itself to scrutiny under the forum doctrine, candidate debates present the narrow exception to the rule." *Forbes*, 118 S. Ct. at 1640. A state-owned public broadcaster may create a candidate debate that is a non-public forum, where access is at the broadcaster's invitation, based on the broadcaster's good-faith editorial judgment. Such a program is characterized by selective, rather than general, access. *Id.* at 1642-43. When a debate on a state-owned public broadcasting facility is a non-public forum, the editor's decision to exclude a legally qualified candidate must not be based on the speaker's viewpoint and otherwise must be reasonable in light of the purpose of the forum. *Id.* at 1643.

This Court stressed in *Forbes* that the evidence offered "powerful support for the jury's express finding that [the public broadcaster's] exclusion of Forbes was not the result of 'political pressure from anyone inside or outside [AETC].'" *Id.* at 1644.

II. The District Court's Findings of Fact and Law, as Affirmed by the Court of Appeals, Satisfy the *Forbes* Test.

The District Court below adopted findings of fact from the jury's advisory special verdict. *Marcus,* 1996 WL 764143, Pet. Apdx B-26. Among other things, the District Court found:

> The Petitioners could not prove that IPTV had not acted in accordance with a predetermined policy in deciding whom to invite to the *Iowa Press* programs (special verdict answer 3);
>
> None of the Petitioner candidates proved that his appearance on *Iowa Press* would have been newsworthy (special verdict answer 5);
>
> The Petitioner candidates could not prove that IPTV excluded them from *Iowa Press* based on disagreement with their political opinions (special verdict answer 6);
>
> IPTV excluded the Petitioner candidates from *Iowa Press* based on independent journalistic judgments regarding newsworthiness (special verdict answer 7); and

> IPTV intended to open *Iowa Press* only to candidates whom IPTV invited (special verdict answer 8).

Id. at *2, Pet. Apdx B-29-30.

In a two-page opinion, the Court of Appeals held that this case is controlled by *Forbes*, 118 S. Ct. 1633, and affirmed the District Court's dismissal. *Marcus v. Iowa Public Television*, 150 F.3d at 925, Pet. Apdx A-1. The Court of Appeals found that the District Court did not clearly err in finding that IPTV did not exclude the candidates because of their viewpoints, and that their exclusion was otherwise reasonable. *Id.* In *Marcus v. Iowa Public Television*, as in *Forbes*, 118 S. Ct. at 1644, "[t]he evidence provide[s] powerful support for the jury's express finding" that the exclusion was not influenced by political pressure, as well as for the District Court's holding that the exclusion was otherwise reasonable.

Petitioners assert that IPTV's reliance on newsworthiness as a criterion for excluding them is impermissible under *Forbes*. Pet. at 8-17. Petitioner's Procrustean reading ignores this Court's confirmation in *Forbes* that a public broadcaster's "journalistic" judgment is central to the congressional framework of broadcast regulation, relying on *Columbia Broadcasting System v. Democratic National Committee*, 412 U.S. 94, 127 (1973) ("*CBS v. DNC*"). *Forbes*, 118 S. Ct. at 1640. Among other things, a "journalistic" judgment can encompass newsworthiness.

Petitioners' invitation to the Court to review the details of the District Court's fact-finding, Pet. at 18-20, also ignores the reminder in *Forbes* that courts need not, and must not,

become involved in attempting to supervise the editorial decisions of broadcast journalists. *Forbes*, 118 S. Ct. at 1640 ("[C]ourts 'would be required to oversee far more of the day-to-day operations of broadcasters' conduct. . . .'") (quoting *CBS v. DNC*, 412 U.S. at 127).

Petitioners, citing *Regan v. Time, Inc.*, 468 U.S. 641 (1984), argue that newsworthiness is a criterion forbidden to state-owned public broadcasters. Pet. at 10-11. Besides ignoring *Forbes'* emphasis on the state-owned broadcast licensee's editorial role, this argument misapplies *Regan*. In *Regan*, the U.S. government was not exercising the editorial role of operating a press, and the government's decisions about content were not proven to be insulated from political pressure (as is the case with IPTV's editorial process). Rather, in *Regan* the government attempted to censor a decision by an editor about content. *Regan* therefore is inapposite.

Petitioners' current theme, that the instant case shows unreasonable editorial decision-making, in contrast to the reasonable editorial judgments in *Forbes*, is ironic in light of Petitioners' argument below that, "[t]his case is indistinguishable from the recent eighth circuit [*sic*] case [of *Forbes*]." Appellants' Brief to the Court of Appeals, filed Nov. 14, 1996, at 13.

No two cases are likely to have facts that trace each other exactly. However, comparing facts in the instant case to those in *Forbes* reveals similarities of decisional significance. Both broadcasters are networks owned by the state; both follow the *Statement of Principles of Editorial Integrity in Public Broadcasting* (*Forbes*, 118 S. Ct. at 1637; *Marcus*, 1996 WL 764143, at *3-*4, Pet. Apdx B-34; *Marcus v. Iowa*

Public Television, 97 F.3d at 1142, Pet. Apdx A-18 (noting that Iowa Code § 256.82(3) specifically adopts the *Principles of Editorial Integrity*)); and both state networks make journalistic decisions that are insulated from political pressure. For all these reasons, last Term's decision in *Forbes* settled all the issues raised by the Petition; Petitioners fail to present any new unsettled questions.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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November 30, 1998

APPENDIX

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

96-3645SIDM

Jay B. Marcus, et al.,	*	
	*	
Appellants,	*	Appeal from the United States District Court for the
	*	
v	*	Southern District of Iowa
	*	
Iowa Public Television, etc., et al.,	*	
	*	
	*	
Appellees.	*	
	*	

On the Court's own motion, this case is removed from the Court's en banc oral argument calendar for Tuesday, April 15, 1997. Further proceedings in this appeal will be held in abeyance pending the United States Supreme Court's decision in No. 96-779 Arkansas Educational Television Commission v. Ralph P. Forbes. This order moots appellees' motion to postpone oral argument.

March 24, 1997

Order Entered at the Direction of the Court:

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In The

Supreme Court of The United States

October Term 1998

JAY B. MARCUS, MARCUS FOR CONGRESS, THE NATURAL LAW PARTY OF IOWA, EDWARD T. RUSK OF THE WORKING CLASS PARTY, EDWARD T. RUSK FOR CONGRESS, MICHAEL CUDDEHE, MICHAEL DIMICK, ROGERS BADGETT, PETER LAMOUREUX, FRED GRATZON, and SUSAN MARCUS,

Petitioners,

v.

IOWA PUBLIC TELEVISION, a state agency, and DANIEL K. MILLER in his official capacity,

Respondents.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Eighth Circuit

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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6 pp

ARGUMENT

This Case Presents Important Questions of Federal Law Fundamentally Different from those Presented in Arkansas Educational Commission v. Forbes.

The questions presented by the Petition for a Writ of Certiorari (hereinafter, the "Petition") are fundamentally important, involving the standards for the participation of minority voices in government-sponsored political debates. While the Court recently decided Arkansas Educational Television Commission v. Ralph P. Forbes, 118 S.Ct 1633 (1998), this case raises different issues, and the Court's review would not simply be a reexamination of Forbes.

Respondent urges the Court *not* to review the facts in this case, stating that "the courts need not, and must not, become involved in attempting to supervise the editorial decisions of broadcast journalists" (Respondents' Brief in Opposition, p. 7-8), citing Forbes at 1640. This argument minimizes the distinction between the editorial decisions of state-owned broadcasters in general, and their decisions about which candidates may participate in political debates. In Forbes, the Court states first that "public broadcasting as a general matter does not lend itself to scrutiny under the forum doctrine," Id. at 1639-40, but then concludes, that candidate debates present a "narrow exception to the rule," in part because of the "exceptional significance" of debates in the electoral process, Id. at 1640.

In advancing their theme that no judicial analysis of

the facts of this case is necessary, Respondents' brief, notably, is devoid of virtually any analysis of the underlying facts that show how this case differs from Forbes. Instead, Respondents recite special verdict responses and conclusions of the District Court that are *not* inconsistent with the Constitutional challenges raised by Petitioners. The District Court found (Pet. Apdx. B-29, 30) that the candidate forum in question was a debate (special verdict answer 1); that IPTV had a predetermined policy in deciding whom to invite to debates (special verdict answer 3, which is consistent with Petitioners' claim that no candidate-by-candidate analysis was undertaken); that none of the Petitioner candidates was newsworthy (special verdict answer 5, which Petitioner claims is an impermissibly subjective and content-based standard); and that the candidates were not excluded because of disagreement with their political opinions (special verdict answer 6). Even this last finding does not mean that the grounds on which Petitioners were excluded was reasonable and not an impermissibly subjective analysis based on the content of the Petitioners' ideas.

Respondents' principal argument, with which Respondents' brief opens (Introduction) and closes (the next to last paragraph, p. 8), appears to be that Petitioner stated to the Eighth Circuit Court of Appeals that this case is indistinguishable from Forbes.

Respondent's argument is superficial. The eighth circuit's decision in Forbes was premised on that court's holding that the question of whether a candidate is "politically

viable" (i.e., had sufficient public support) is [too] subjective "for the exercise of governmental power consistent with the First Amendment." Forbes v. Arkansas Educational Television, 93 F.3d 497, 505 (8th Cir. 1996). Petitioners have consistently argued in the eighth circuit and here that the "newsworthiness" standard used by Iowa Public Television ("IPTV"), while different from the standard applied in Forbes, is also too subjective. However the "indistinguishability" of the two cases ends there.

First, on review, this Court did not find fault with the eighth circuit's decision that a *subjective* standard is impermissible; rather, the Court impliedly endorsed the eighth circuit's condemnation of subjective standards for candidate selection since the Court based its decision to reverse on a finding that Arkansas Educational Television made a reasonable decision and that "Forbes own *objective* lack of support...was the criterion." Id. at 1644. (Emphasis added).

This case presents, as the first question not settled by Forbes, whether newsworthiness is an impermissibly subjective standard. In this regard, IPTV has admitted that a determination of newsworthiness is "extraordinarily subjective," Trial Ex. 20, Miller Depo. at 22, lines 5-18, and since a decision about whether a candidate is newsworthy depends, in no small measure, on an analysis of the candidate's ideas, the fundamentally subjective nature of the decision is apparent.

This case, then, presents a second important question, not present in Forbes, of whether the "newsworthiness"

standard is impermissibly content or viewpoint-based, since the district Court defined the term "newsworthy," using an ordinary dictionary definition, to mean whether the candidates or their material were "sufficiently interesting" to the public. Jury Instruction No. 15, Pet. Apdx. B-36. Respondents' brief never denies that a determination of newsworthiness involves an analysis of a candidate's ideas, and the testimony from IPTV"s own witnesses shows the content-based nature of the analysis.

IPTV's Professor Mack testified that newsworthiness is evaluated based on whether the interviewee (candidate) has "information to share with viewers that will inform them...help them make a better decision...enable them to be better taxpayers, better citizens..." Pet. at 7-8. In addition, IPTV's Mike Newell, who excluded the Petitioner candidates on the basis of a lack of newsworthiness, testified that "newsworthiness would indicate...that we have a tendency to make news at the Iowa Press table, or . . . to flesh out what already is in the news, or to add to what is generally known to our viewer- ship." Trial Ex. 19, Newell Depo. at 16-17. IPTV evaluated the candidates based on the ideas expected to be presented by them, and whether these ideas would "add to what is known to the viewership" or "flesh out what is in the news."

The Marcus case, unlike Forbes, stands for the proposition that minority candidates can be prevented from participation in debates based on an admittedly subjective standard that analyzes whether the candidate's ideas are

sufficiently interesting. There is no plausible argument that this was the decision of the Court in Forbes.

Because this case, unlike Forbes, involves an analysis of "newsworthiness," the real basis on which most journalists will make their decisions, this case will provide more guidance to the lower courts than Forbes on this important issue. While the District Court held that "it is profoundly important that the defendant network [IPTV] and its news editors be allowed to exercise independent journalistic and editorial judgments based on newsworthiness," Marcus v. Iowa Public Television, No. 4-96-CV-80690, 1996 WL 764143 (S.D. Iowa, October 9, 1996) (Pet. Apdx. B-33), Petitioners contend that it is even more profoundly important that minority voices not be silenced because of the government's "extraordinarily subjective" determination that a candidate is not "sufficiently interesting."

The Petition should be granted.

Respectfully submitted,

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December 9, 1998

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